

But on November 9, 1999, the Appeals Board found that respondent and its insurance carrier had made a preliminary showing of fraud or serious misconduct that

might justify setting aside the initial award. Therefore, the Appeals Board stayed the payment of benefits to claimant and the Board remanded the claim to the Judge for taking additional evidence and for determining the requests from respondent and its insurance carrier for (1) review and modification, (2) vacating the February 2, 1999 Order, and (3) dismissing the claim at the insistence of the Victoria Acosta of Austin, Texas, whose name and social security number were allegedly used by claimant for purposes of litigating this claim. Additionally, the Board affirmed the Judge's order compelling claimant to appear for a deposition and to produce documents.

By a June 8, 2000 Decision, which is the subject of this appeal, Judge Fuller found that the initial award entered in this claim was obtained by fraud or serious misconduct. The Judge determined that claimant's initial award of benefits should be voided and this claim dismissed. The Judge did not address a request made by claimant for penalties and sanctions for nonpayment of benefits as the Judge determined that request was rendered moot.

Claimant contends Judge Fuller erred in the June 8, 2000 Decision and the Appeals Board erred in its November 9, 1999 Order. In the brief filed with the Appeals Board, claimant argues that (1) the Appeals Board, as a matter of law, erred by staying the payment of benefits while the review and modification proceeding was pending, (2) the Board acted illegally and erred when it allegedly issued a temporary injunction against claimant from receiving benefits, (3) the Board acted in a manner that was unreasonable, arbitrary, or capricious when it allegedly applied holdings from other Appeals Board decisions, (4) the Board erred, as a matter of law, by failing to apply the two-year statute of limitations for fraud, (5) it is unconstitutional to deny a work disability because an injured worker is an illegal alien, (6) the Board erred by finding the respondent and its insurance carrier's request for review and modification substantially complied with statutory requirements, (7) the Board erred by requiring claimant to appear for a deposition, (8) the Board erred by finding claimant committed fraud or serious misconduct, (9) the Board erred by permitting the Judge to take under advisement claimant's request for penalties, and (10) the Judge erred by dismissing the claim and setting aside the award.

Conversely, respondent and its insurance carrier argue that the June 8, 2000 Decision should be affirmed. They argue that claimant has committed, and continues to commit, fraud or serious misconduct upon the Division of Workers Compensation that renders the initial award of benefits void *ab initio*.

The issues before the Appeals Board on this review are:

1. Did the Board err by staying the payment of benefits during the pendency of the review and modification proceeding?
2. Did the Board err by finding that respondent and its insurance carrier's request for review and modification was sufficient to commence a proceeding under K.S.A. 44-528?

3. Did the Board err by requiring claimant to appear for a deposition for purposes of the requests for vacating or modifying the award?
4. Did the claimant commit fraud or serious misconduct?
5. If so, should the initial award granting claimant benefits be voided *ab initio* or modified effective a specific date?
6. Did the Board err by permitting the Judge to take under advisement claimant's request for penalties?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. On September 8, 1995, claimant was injured while working for respondent. On February 2, 1999, the Appeals Board entered an Order granting claimant permanent partial disability benefits for an eight and one-half percent whole body functional impairment, followed by an 80 percent work disability, followed by a 58 percent work disability. The temporary total disability and permanent partial disability benefits totaled \$78,608.38.
2. Sometime after the February 2, 1999 Order was entered, respondent and its insurance carrier located a Victoria Acosta of Austin, Texas, who swore that (1) she is the person issued the social security number used in this claim, (2) she has never worked for respondent, (3) she did not file this workers compensation claim, and (4) she desires this claim be dismissed.
3. After learning the above and alleging fraud, respondent and its insurance carrier requested (1) review and modification of the Appeals Board's February 2, 1999 Order, (2) an order vacating the February 2, 1999 Order, (3) an order staying benefits pending resolution of the issues, (4) an order compelling claimant to appear at a deposition and to produce documents, and (5) an order dismissing the claim at the request of the Victoria Acosta issued the social security number used by claimant in this claim.
4. During the same time frame, claimant filed an application for penalties for nonpayment of benefits and an objection to the requested review and modification proceeding.
5. On April 22, 1999, Judge Fuller conducted a hearing to address the various requests filed by the parties. At that hearing, Victoria Acosta of Austin, Texas, testified and established that this claim was litigated under her social security number. By Order dated April 28, 1999, Judge Fuller denied the requests to vacate the award and to stay the payment of benefits. But the Judge ordered claimant to appear for a deposition and produce documents for purposes of proving her identity. Additionally, the Judge took under

advisement claimant's request for penalties and the request to deny the application for review and modification.

6. Respondent and its insurance carrier appealed the April 28, 1999 Order to the Appeals Board. By Order dated November 9, 1999, the Appeals Board found that claimant had initiated this claim under an assumed name and/or an incorrect social security number. In that Order, the Board found that respondent and its insurance carrier made a preliminary showing that claimant had committed fraud or serious misconduct that might render the initial award of benefits void.

In the November 9, 1999 Order, the Board held: (1) the request from Victoria Acosta of Austin, Texas, to dismiss the claim was denied as claimant, whatever her true name and identity, was injured while working for respondent and is entitled to receive workers compensation benefits for that injury, (2) claimant's true identity was material as a worker's history of preexisting functional impairment and work history are relevant in determining permanent partial general disability, (3) an award may be reviewed and modified when it was obtained by fraud or serious misconduct,¹ (4) after a preliminary showing of fraud or serious misconduct, which is of such degree that it may constitute grounds to void an award, benefits may be stayed until additional evidence is taken and a final award entered upon a request for vacating an award or request for review and modification, (5) the application for review and modification, along with the other documents filed within the same time frame, substantially complied with K.S.A. 44-528 and K.A.R. 51-19-1 and, therefore, the application was valid to commence a review and modification proceeding, (6) claimant could be compelled to testify and produce documents,² and (7) under these exceptional circumstances, the request for penalties for nonpayment was properly taken under advisement pending resolution of the request for review and modification and the request for vacating the February 2, 1999 Order.

The November 9, 1999 Appeals Board Order remanded this claim to the Judge to address the issues in the requests to vacate the February 2, 1999 Order, to review and modify the February 2, 1999 Order, and to dismiss this claim.

7. Claimant appealed the November 9, 1999 Order to the Court of Appeals but the Court refused to address the issues raised as it found the case was not ripe for review.³

8. On April 21, 2000, while the claim was before Judge Fuller on remand, claimant appeared for a deposition. Because answering might incriminate her, claimant refused to

¹ K.S.A. 44-528(a).

² K.S.A. 44-551(b)(1).

³ Acosta v. National Beef Packing Company, L.P., No. 99-84,304 (January 27, 2000).

answer questions regarding the following: (1) her name, (2) her social security number, (3) her date of birth, (4) whether she had any documents that would reveal her true identity, (5) whether she had a social security card with her true name, (6) whether she had a birth certificate that showed her true identity, (7) when she moved to the United States, (8) whether she worked in the United States for any employer other than respondent, (9) whether she worked in the United States under any name other than Victoria Acosta and the social security number used in this claim, (10) whether she had filed any workers compensation claims other than this claim, (11) where she worked before she began working for respondent, (12) the names and social security numbers that she has used while working in the United States, (13) whether she had sustained any work-related injuries other than the one that is the subject of this claim, (14) whether it was presently legal for her to work in the United States, (15) whether her legal status had any relationship to her presently not working, (16) whether potential employers are asking her whether she may legally work in the United States, (17) whether she is presently living in Great Bend, Kansas, (18) her address in Great Bend, Kansas, (19) whether she has lived anywhere other than Great Bend and Garden City since leaving respondent's employment, (20) whether she received a letter from the Social Security office in Dodge City to verify her social security number, (21) whether she had visited the Social Security office to verify her social security number, (22) whether she prepared an I-9 form when she applied for a job with respondent, (23) whether her signature appeared on the I-9 form that was in her personnel file compiled by respondent, (24) whether she provided respondent with identification when she applied for employment, (25) whether she provided respondent with an identification card from Nebraska and a social security card, (26) whether she has filed any income tax returns with the federal government since she began working in the United States, (27) whether she has filed any income tax returns with the State of Kansas, (28) whether she has any children, (29) whether she is married, (30) if she is married, her husband's name, (31) if she has children, their names and ages, (32) whether her parents are alive, (33) the names and ages of her parents, and (34) her parents' address.

Claimant refused to answer other questions on the basis that the questions violated the attorney-client privilege.

9. In the June 8, 2000 Decision, which is the subject of this appeal, Judge Fuller dismissed this claim and voided the Appeals Board's February 2, 1999 Order, which granted claimant benefits.

10. The Appeals Board finds that claimant has used an assumed name and another's social security number in this claim. The Board finds that claimant has falsely represented herself as Victoria Acosta in this proceeding when the true Victoria Acosta having the social security number used in this proceeding resides in Austin, Texas, and has never worked for respondent, nor filed a workers compensation claim against respondent. The Board also finds that such misrepresentation and concealment prevented respondent and its insurance carrier from investigating claimant's actual work and medical histories.

CONCLUSIONS OF LAW

1. After considering the parties' arguments, the Appeals Board finds that Judge Fuller's June 8, 2000 Decision should be affirmed in part and modified in part. The Board affirms the Judge setting aside and voiding the award *ab initio* due to either fraud or serious misconduct committed by claimant in this proceeding. But the proceeding should not be dismissed as claimant retains the right to seek benefits for the September 8, 1995 work-related injury that she sustained while working for respondent.
2. For the reasons set forth in the November 9, 1999 Order, the Appeals Board concludes that it was proper to stay the payment of benefits during the pendency of the request to vacate the February 2, 1999 Order awarding benefits and of the request to review and modify the award. For the reasons also set forth in the November 9, 1999 Order, the Appeals Board also concludes that it was proper for the Judge to take under advisement the request for penalties and that the request for review and modification was sufficient to commence such a proceeding. Additionally, the November 9, 1999 Order sets forth the reasons why claimant could be compelled to testify in this proceeding.
3. The Appeals Board concludes that claimant has intentionally misrepresented and concealed her true name and identity. Because of the manner in which permanent partial general disability benefits are computed, a worker's true name and identity are relevant and material. It is not only the misrepresentation that claimant made in her employment application with respondent that is egregious. But it is also the misrepresentation and concealment that was practiced upon the respondent and its insurance carrier in this claim.

The Workers Compensation Act provides that awards obtained by fraud or serious misconduct may be modified (or set aside) "upon such terms as may be just," subject to the limitations contained in the Act. The review and modification statute, K.S.A. 44-528(a), reads, in part:

The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, **upon such terms as may be just**, by increasing or diminishing the compensation **subject to the limitations provided in the workers compensation act.** (Emphasis added.)

The review and modification statute authorizes the Director of Workers Compensation to create rules and regulations governing the number of reviews that can be initiated. The statute also restricts the effective date of a modification when the

modification is based upon a change in the worker's functional impairment or work disability. The Act reads:

Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.⁴

The Act does not restrict the effective date that an award can be modified or set aside when there is fraud or serious misconduct.

In addition to constituting grounds to vacate or modify an award, misrepresenting and concealing material facts in a workers compensation proceeding may constitute a fraudulent or abusive practice as defined by the Workers Compensation Act.⁵

4. The Judge properly set aside the February 2, 1999 Order awarding claimant benefits. Claimant concealed and misrepresented her identity. Therefore, respondent and its insurance carrier could not investigate or verify any employment or medical history. Claimant now refuses to provide respondent and its insurance carrier with the names of any employers where she worked before commencing work with respondent and refuses to provide information regarding earlier injuries or claims. Claimant also refuses to answer questions regarding her present status to legally work in the United States.

5. Because of refusing to answer questions that would permit respondent and its insurance carrier to inquire into claimant's actual work history, respondent and its insurance carrier are unable to investigate and analyze claimant's actual former job tasks for purposes of determining the percentage of task loss that claimant may have sustained as a result of the September 8, 1995 work-related injury.

Claimant's injuries comprise an "unscheduled" injury. Therefore, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a **percentage**, to which the employee, in the opinion of the physician, has **lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the**

⁴ K.S.A. 44-528(d).

⁵ K.S.A. 44-5,120(d)(4)(B).

fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of Foulk⁶ and Copeland.⁷ In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁸

Additionally, because of refusing to reveal whether she can legally work in the United States, respondent and its insurance carrier cannot analyze or determine whether that factor plays any role in claimant's present unemployment, in determining whether claimant has exercised good faith in attempting to find appropriate employment, or in determining claimant's wage-earning ability.

Further, the Court of Appeals has held that falsifying an employment application can be the basis for denying a work disability and limiting a worker's permanent partial disability benefits to the functional impairment rating.⁹

⁶ Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

⁷ Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁸ Copeland, p. 320.

⁹ Ramirez v. Excel Corp., 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* ____ Kan. ____ (1999).

6. Because of refusing to answer questions regarding prior injuries and previous workers compensation claims, respondent and its insurance carrier are prohibited from obtaining discoverable information and analyzing and determining whether any award due claimant should be reduced as the result of a preexisting functional impairment.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when an accident aggravates a preexisting condition. The Act reads, in part:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.¹⁰

7. Because claimant refuses to testify regarding material and relevant facts, the award of benefits, which was obtained through either fraud or serious misconduct, should be set aside and voided *ab initio*. Claimant should not receive an award in this proceeding until such time as she is forthright and an award can be entered in a just amount based upon the facts.

8. Claimant argues that the Appeals Board has determined that claimant is an illegal alien and, therefore, should not receive workers compensation benefits. The Appeals Board disagrees with that conclusion. First, the Board has not found that claimant is an illegal alien or that claimant cannot legally work in the United States. Second, if claimant could not legally work in the United States, that factor alone would not prevent her from recovering workers compensation benefits. On the other hand, it cannot be ruled out that there may be some situations where a worker's legal status may be relevant in determining whether there has been a good faith effort to find appropriate employment or in determining whether the difference in a worker's pre- and post-injury wages has been caused by a work-related injury or some other reason.

The Appeals Board notes that claimant reserves her constitutional arguments for appellate court review.

9. The Appeals Board adopts the findings and conclusions set forth in the November 9, 1999 Order and the June 8, 2000 Decision to the extent that they are not inconsistent with the above.

¹⁰ K.S.A. 44-501(c).

AWARD

WHEREFORE, the June 8, 2000 Decision entered by Judge Fuller is affirmed in part and modified in part. The Decision is modified as the claim is not dismissed. In all other respects the June 8, 2000 Decision is affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
D. Shane Bangerter, Dodge City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director